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In The

Supreme Court of the United States

October Term, 1982

THOMAS CRAIG, JR., and ORRIN T. LANKFORD,

Petitioners,

vs.

SIDNEY BARNEY, GREGORY WELSH, PHILLIP R. BROOKS, SEYMOUR BATES, ALVIN SHEFFIELD, CARLISS A. BATTS, ESTELLE G. EVANS, WILLIAM F. McCOY ELBERT L. PUGH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

LAWRENCE E. BLAKE
Route 106
Prince George, Virginia 23875
(804) 732-3422

BURTON W. SANDLER
Suite 600
28 Allegheny Avenue
Towson, Maryland 21204
(301) 821-6777

CLARENCE B. NEBLETT, JR.
5905 W. Broad Street
Richmond, Virginia 23230
(804) 282-5656

Attorneys for Petitioners

6954

LUTZ APPELLATE PRINTERS, INC.
NY (212) 840-9494 • (516) 222-1606 • (914) 683-9363
NJ (201) 257-6850 • PA (215) 563-5587 • DC (202) 783-7288 • MA (617) 542-1114

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fourth Circuit erroneously abstain from reaching the merits of this case thereby barring the petitioners from the federal forum in which the vindication of federal constitutional rights was sought under 42 U.S.C. §1983?

2. Is the federal relief sought barred by the doctrine of res judicata?

3. Does the production of presumptively protected material under the First Amendment, pursuant to the subpoena power of the Virginia Special Grand Jury, constitute a prior restraint and "chill" on First Amendment rights?

4. Is the compelled production of presumptively protected materials by the Virginia Special Grand Jury violative of the Fifth Amendment when such production may tend to incriminate those compelled to produce the materials?

5. Is due process violated when the Special Grand Jury, pursuant to its subpoena power, compells the production of presumptively protected material prior to a determination on the question of obscenity?

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OPINION BELOW

On May 20, 1982, the United States Court of Appeals for the Fourth Circuit filed a published opinion affirming the decision of the United States District Court for the Eastern District of Virginia, at Richmond; the Honorable D. Dortch Warriner, District Judge presiding, abstaining from the consideration of the merits under the *Younger v. Harris* doctrine. The Court of Appeals found that the doctrine of federal abstention espoused in *Younger v. Harris* was applicable to the case and that Virginia's interest

in the unfettered operation of its grand jury system was an important state interest outweighing the alleged constitutional violations asserted by the petitioners. The Court of Appeals, therefore, did not reach the merits of the case.

It is from this decision that the petitioners file this timely petition for writ of certiorari requesting this Honorable Court to reverse and remand the decision entered below.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on May 20, 1982, and the judgment was thus final. The jurisdiction of this Court is invoked under Title 28 U.S.C.A. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and the provisions of Virginia Code Annotated §19.2-212 are set forth in the appendix.

STATEMENT OF THE CASE

This case came before the Circuit Court of Petersburg, Virginia with the Honorable Judge Oliver Pollard, Jr. presiding. He empaneled a Special Grand Jury, pursuant to the request of the regular grand jury for the April Term, to investigate instances of alleged prostitution in the adult bookstores of Petersburg, Virginia. The Special Grand Jury was composed of the same seven members of the grand jury which had previously heard testimony in a prostitution trial involving an alleged oral sex incident at an adult bookstore.

The foreman of the Special Grand Jury signed and issued a subpoena on May 22, 1981, summoning the petitioners to appear before the Special Grand Jury on May 29, 1981. It further required that the petitioners produce the following:

> 1. All books and records, including invoices, journals, ledgers, and cancelled checks, relating to the purchase of any publication which is offered for sale on the date this subpoena is issued.
>
> 2. All books and records, including tax returns, information returns, journals and ledgers relating to gross sales in the two years preceding the date this subpoena is served.
>
> 3. All books and records of any nature relating to any device in operation of your business on the date this subpoena is served on which still or motion pictures are viewed by customers.
>
> 4. One copy of each and every book, magazine, pamphlet, or other publication which is offered for public sale on the date this subpoena is served.

In a letter to the petitioners, Mr. Gregory Welsh, Deputy Commonwealth Attorney for the City of Petersburg, Virginia, informed the petitioners that they must surrender the material inventoried by the police at the time of the inventory or produce the same before the grand jury. If the material was not accordingly surrendered, it would be seized. Consequently, petitioner Lankford surrendered all of the publications that were inventoried at the time of the actual inventory. Petitioner Craig refused to surrender any material alleging violations of his First, Fourth, Fifth and Fourteen Amendment rights.

At a Special Grand Jury hearing held on May 29, 1981, in the Circuit Court of Petersburg, the Honorable Oliver A. Pollard, Jr. ruled that the petitioners must appear before the Special Grand Jury as subpoenaed. At the special hearing, the petitioners filed a motion to quash the aforesaid subpoena. The Honorable Judge Oliver Pollard, Jr. set a hearing of this motion for June 22, 1981.

At the Special Grand Jury proceeding on May 29, 1981, petitioners Craig and Lankford asserted their rights under the Fifth Amendment to the United States Constitution, refusing to testify. Petitioner Craig also refused to produce tangible evidence. The foreman of the Special Grand Jury requested that the Deputy Commonwealth Attorney move that the petitioners be held in criminal contempt.

At the June 22, 1981 hearing on the motion to quash the aforementioned subpoena, the Honorable Oliver A. Pollard, Jr. ruled that petitioners could not be compelled to testify under the subpoena in that it failed to provide petitioners with adequate notice that the testimony would be required of them pursuant to the Va. Code Rule 3A:15. Judge Pollard, by his own admission, invalidated the subpoenas in question.

The Honorable Judge Oliver Pollard, Jr. also set a hearing on whether petitioners could be compelled to answer questions or produce documents under a new subpoena for June 30, 1981.

Judge Pollard indicated that he would uphold the validity of compelling the production of all aforementioned documents and magazines to the Special Grand Jury without a showing of necessity, provided the Special Grand Jury promised to surrender the documents back to petitioners within a "reasonable amount of time."

Judge Pollard further requested that the Special Grand Jury submit questions it intended to ask petitioners to the court on June 30, 1981. At that time, the court ruled on whether the petitioners could assert their Fifth Amendment rights to any or all of the aforementioned questions.

At the subsequent hearing of June 30, 1981, the court again stated that the petitioners must produce the documents and magazines in question, pursuant to the original subpoena, "sustain[ing] the validity of the subpoena issued by the Special Grand Jury."

At the same hearing, the court "ruled . . . that the subpoena was invalid." Upon the strength of this conflicting ruling on the validity of the old subpoena and subsequent "voidness" of the proceedings before the Special Grand Jury, the court then ordered that questions and statements taken directly from the Special Grand Jury record could be heard by the court, prior to the conclusion of the Special Grand Jury's investigation, in violation of Va. Code §19.2-212. The court then ruled separatedly and specifically on whether, compelling petitioners to answer any questions taken from that record, would violate petitioners Fifth Amendment rights.

The court, in conclusion, ordered petitioner Craig to produce the documents and magazines heretofore listed, pursuant to a subpoena issued July 31, 1981 at 9:00 a.m. The court further ordered that the Special Grand Jury could keep several of the magazines taken pursuant to the old subpoena issued upon petitioner Lankford. The court then ordered petitioner Lankford to produce the remaining documents and to testify pursuant to a then issued subpoena for July 31, 1981 at 9:00 a.m.

On July 9, 1981, the Special Grand Jury foreman issued a new subpoena to petitioner Craig. Petitioner Craig's subpoena

contained requests for the production of documents and magazines as listed in the old subpoena's issuance.

Subsequently, on July 9, 1981, the Special Grand Jury's foreman issued a new subpoena to petitioner Lankford. This subpoena contains requests for the production of documents and magazines as listed in the old subpoena parts a, b, and c. Petitioner Lankford was not required to produce magazines under the new subpoena, as the Special Grand Jury was empowered by Judge Pollard to retain magazines pursuant to the old subpoena, despite the "invalidation."

Consequently, on July 21, 1981, the petitioners filed a motion for a 42 U.S.C. §1983 action, along with a temporary restraining order, enjoining state Special Grand Jury proceedings. On July 24, 1981, a hearing was held on the motion in the United States District Court for the Eastern District of Virginia, Richmond Division. Accordingly, the motion was denied. On August 6, 1981, the petitioners filed an amended complaint for a preliminary injunction. Respondents filed a motion to dismiss on August 13, 1981 and petitioners responded on August 26, 1981. Respondents' motion to dismiss the amended complaint was granted on September 16, 1981 by the United States District Court Judge Dortch Warriner for the Eastern District of Virginia. An appeal was then filed by petitioners in the United States Court of Appeals for the Fourth Circuit on November 20, 1981.

Oral argument before the Court of Appeals was held on March 3, 1982. The Court of Appeals rendered its decision on May 20, 1982 affirming the decision of the United States District Court for the Eastern District of Virginia to abstain under the doctrine of *Younger v. Harris* and therefore did not reach the merits of the case. A petition for writ of certiorari was subsequently filed with this Honorable Court for a determination of the substantial constitutional issues presented.

HOW THE FEDERAL QUESTIONS WERE RAISED

The petitioners raised the deprivation of their constitutional rights under the First, Fourth, Fifth and Fourteenth Amendments in their amended complaint before the United States District Court for the Eastern District of Virginia filed pursuant to 42 U.S.C. §1983, which is printed in the appendix at 7a. These issues were subsequently reraised on appeal to the United States Court of Appeals for the Fourth Circuit following the District Court's decision to abstain from reaching the merits of the case under the doctrine of *Younger v. Harris* which is printed in the appendix at 1a. The United States Court of Appeals, on May 20, 1982, affirmed the District Court's decision. The Court of Appeals' published opinion is reprinted in the appendix at 1a.

REASONS FOR GRANTING THE WRIT

Review by this Court is in the public interest and is desirable as it is necessary for this Court to resolve the conflicts created by the decision of the lower court in light of 42 U.S.C. §1983 and the serious constitutional issues raised in light of First, Fourth, Fifth and Fourteenth Amendment considerations.

I.

The doctrine of abstention is inappropriate when applied to bar the petitioners from access to the federal forum to vindicate federal constitutional rights under 42 U.S.C. §1983.

On May 20, 1982, the United States Court of Appeals for the Fourth Circuit rendered its decision in this case, holding that the doctrine of *Younger v. Harris,* 401 U.S. 37 (1971) was applicable and that the federal court must "refrain from hearing constitutional challenges to state action in certain circumstances

where federal intervention is regarded as an improper intrusion into the rights of a state to enforce its laws in its own courts."[1]

The petitioners submit to this Court that the Court of Appeals' reliance on *Younger* is misplaced, particularly in light of 42 U.S.C. §1983 which was created specifically to provide a federal forum in which to vindicate the violation of federal constitutional rights.

Recently, in *Patsy v. Florida Board of Regents*, No. 80-1874, 50 L.W. 4731 (1982), this Court, in considering whether exhaustion of state administrative remedies is required as a prerequisite to an action under 42 U.S.C. §1983, examined the legislative intent behind §1 of the Civil Rights Act of 1871, 17 Stat. 13, the precursor of §1983. In its examination of the congressional intent, the Court stated:

> "Many legislators [of the 1871 Congress] interpreted the bill to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief. Cf. *Monroe v. Pape*, 365 U.S. 167, 183 (1961) ('[t]he federal remedy is supplementary to the state remedy, and the latter need not be just sought and refused before the federal one is invoked')." 50 L.W. at 4733.[2]

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1. Decision, Case No. 81-6890, page 3.

2. "The very purpose of §1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights. . ." *Mitchum v. Foster*, 407 U.S. 225, 92 S. Ct. 2141 at 2162 (1972). *See also, Judice v. Vail*, 430 U.S. 327 at 342 (dissent, Brennan, J.).

There is, therefore, a fundamental conflict between the congressional purpose and operation of 42 U.S.C. §1983 which is intended to "throw open the doors of United States Courts to individuals who were threatened with, or who had suffered the deprivation of constitutional rights." 50 L.W. at 4733, and the effect of *Younger, supra,* and its progeny which restricts access to the federal forum in situations where state proceedings are pending.

The court below, in rejecting the petitioners' argument that no state proceeding was pending since the Virginia Special Grand Jury has no power to issue indictments against the petitioners,[3] indicated that the petitioners were subject to the contempt power of the Virginia Circuit Court for failure to comply with the subpoenas requesting the production of materials contained within their stores.

The court's reliance on *Judice v. Vail,* 430 U.S. 327 (1977), is misplaced and distinguishable from the case at bar. In *Vail, supra,* the appellees were held in contempt by the New York state court. The Supreme Court, in considering whether federal interventions under 42 U.S.C. §1983 was consistent with the principles of *Younger* stated: "These principles apply to a case in which the State's contempt process is involved." *supra* at 335. In the case at bar, no contempt proceedings have commenced and therefore the process is not yet involved.[4]

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3. Va. Code §19.2-213-124 (1975).

4. Petitioner Lankford complied with the subpoena and surrendered the requested documents and materials and therefore would not be subject to the contempt jurisdiction of the Virginia Circuit Court.

To apply the principle espoused in *Vail, supra,* to this case is directly contrary to the congressional intent of 42 U.S.C. §1983 and requires the petitioners to violate the law prior to being afforded a forum, state or federal, in which to press their constitutional claims. Unlike the appellees in *Vail, supra,* the petitioners here have not "had an opportunity to present their federal claims in the state proceedings." *supra* at 337.

The petitioners here are in the posture of being placed between "the Scylla of intentionally flouting state law and the Charybdis of foregoing what [they] believe to be constitutionally protected activity. . ." *Steffel v. Thompson,* 415 U.S. 452 (1974). On the one hand, the Legislature has specifically enacted legislation affording access to the federal forum for the redress of constitutional grievances and on the other, the courts have expressly restricted such access. The petitioners have been subjected to continuing violations of First, Fourth, Fifth and Fourteenth Amendment guarantees based upon the conduct of the Virginia Special Grand Jury,

Currently, these petitioners have no forum in which to seek judicial redress. The petitioners submit to this Court that, under the circumstances herein presented, the better view of the effect of abstention was reflected by Mr. Justice Brennan in his dissenting opinion in *Judice v. Vail, supra.* In criticizing the doctrine of abstention in the name of federalism, Justice Brennan insightfully stated: "These decisions . . . have given this great concept a distorted and disturbing meaning. Under the banner of vague, undefined notions of equity, comity and federalism, the Court has embarked upon the dangerous course of condoning both isolated, *Paul v. Davis,* 424 U.S. 693 (1976) and systematic, *Rizzo v. Goode, supra,* violations of civil liberties." *supra* at 346.

The petitioners respectfully submit to this Honorable Court that the facts of this case clearly present circumstances indicating

a systematic violation of constitutional guarantees and unless the petitioners are permitted to proceed in the federal forum, their substantial federal claims cannot be vindicated.

II.

The federal relief sought is not barred by the doctrine of res judicata and collateral estoppel.

The doctrine of res judicata may be briefly stated as follows:

> "The doctrine of res judicata dictates that there be an end to litigation. '[I]t rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations.' Commissioner v. Sunnen, 333 U.S. 591, 597 S.Ct. 715, 719 92 L.Ed. 898 (1948); however, res judicata serves as a bar to a subsequent litigation only when the prior judgment was returned by a court of competent jurisdiction, when the prior judgment was a final judgment on the merits, when the same parties and their privies are involved in both suits, when the two actions are based on the same issues and material facts and when the two proceedings present the same cause of action."

United States v. Mumford, 630 F. 2d 1023, 1027 (1980); *Allen v. McCurry*, 101 S. Ct. 411 (1980).[5] The doctrine of res judicata and collateral estoppel has been held to be fully applicable to the federal courts. *Allen v. McCurry, supra* at 414.

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5. *See also, Johnson v. United States*, 576 F. 2d 606 (5th Cir. 1978); *Gilbert v. Bagby*, 492 F. Supp. 714 (M.D.N.C. 1980).

The Court of Appeals for the Fourth Circuit in *Mumford, supra,* refused to invoke the doctrine of res judicata when the federal government instituted a criminal proceeding subsequent to having an issue determined adversely to it in a civil action. The court held that the "two proceedings [did] not present the same cause of action" and therefore held the doctrine of res judicata inapplicable, *supra* at 1027. The case before the Circuit Court of Petersburg was predicated upon a motion to quash a grand jury subpoena while the federal suit, filed under 42 U.S.C. §1983, alleges the deprivation of federal constitutional rights and seeks injunctive and declaratory relief. The distinction made in *Mumford, supra,* exists here. The state proceeding is essentially criminal in nature, while the federal suit under 42 U.S.C. §1983 is a civil case. Therefore, the doctrine of res judicata is inapplicable as separate causes of action exist.

The doctrine of res judicata and collateral estoppel are applicable only when the issues are directly determined, *United States v. Mumsingwear, Inc.,* 340 U.S. 36 (1949) or where the litigant had a " 'full and fair opportunity' to litigate that issue in the earlier case." *Allen v. McCurry, supra* at 415.

The record below reveals that the constitutional issues presented before the federal court were not directly determined and even though the petitioners' constitutional rights were raised before the Circuit Court, the court did not render any decision on those issues which precluded the petitioners from a "full and fair opportunity to litigate."[6]

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6. The Honorable Judge Oliver Pollard, Jr. of the Circuit Court of Petersburg merely upheld the validity of the issued subpoenas without comment as to the constitutional claims attempted to be raised.

The memorandum opinion of the United States District Court, per Judge Warriner, comments specifically on the respondents' refusal to raise the issue of res judicata and concedes that "the doctrine of res judicata . . . may be inapplicable to the case at bar."[7]

The doctrine of res judicata is therefore applicable only where a final judgment on the merits has been rendered. *United States v. Mumford, supra.* The Honorable Judge Pollard's denial of the petitioners' motion to quash is interlocutory and as such, is not a final judgment. *Alexander v. United States,* 201 U.S. 117, 26 S. Ct. 356, 50 L. Ed. 686 (1906); *Petition of Shelley,* 5 A. 2d 613 (1939).

In *Alexander v. United States, supra,* the Supreme Court held that an order from the Circuit Court requiring compliance with a subpoena duces tecum was not a final order and therefore not appealable. Mr. Justice McKenna, writing for the majority, stated:

> "I am of the opinion that the mere direction of the court to the witnesses to answer the questions put to them and to produce the written evidence . . . is not a final decision; that it more appropriately is an interlocutory ruling . . ." *supra* at 122.

See also, New York Times Co. v. Jascalevich, 439 U.S. 301, 302 (1978); *United States v. American Telephone and Telegraph Co.,* 642 F. 2d 1285 (1980); *Catlin v. United States,* 324 U.S. 229, 65 S. Ct. 631, 89 L. Ed. 911 (1945).

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7. Memorandum Decision, 16 September 1981, p. 3.

The above authority requires that contempt proceedings be initiated before a defendant's right to appeal a court order for compliance ripens. To date, neither petitioner has been cited for contempt by the state Circuit Court and therefore the court order requiring compliance with the subpoenas remains interlocutory and non-appealable, thereby rendering the doctrines of res judicata and collateral estoppel inappropriate in this instance.

III.

The state Special Grand Jury has utilized its subpoena power to effect an impermissible prior restraint and a "chill" upon First Amendment rights.

The Special Grand Jury of the Circuit Court in Petersburg, Virginia, issued subpoenas to the petitioners requiring the production of books, magazines and business records contained in their respective establishments.[8]

The petitioners respectfully submit that the procedure utilized by the Special Grand Jury requiring the production of one copy of each book, magazine, pamphlet or other publication offered for public sale constitutes an impermissible prior restraint and a "chill" upon the rights guaranteed under the First Amendment.

The subpoenaed materials, books, magazines, pamphlets and all other publications contained within the petitioners' bookstores,

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8. The first subpoena was issued on May 22, 1981 and was subsequently held invalid as being overbroad on June 22, 1981. The court issued a second subpoena on July 7, 1981. In compliance with the first subpoena dated May 22, 1981, petitioner Lankford produced the requested material. Petitioner Craig refused to produce on First Amendment self-incrimination grounds. Following the invalidation of the subpoena dated May 22, 1981, the materials produced by petitioner Lankford were retained by the Special Grand Jury.

as well as the setting of the bookstores themselves, are presumptively protected under the First Amendment. *Roaden v. Kentucky,* 412 U.S. 505, 93 S. Ct. 2796, 2801 (1973); *Heller v. New York,* 413 U.S. 483, 489, 93 S. Ct. 2789 (1973); *Stanford v. Texas,* 379 U.S. 476, 485, 85 S. Ct. 506, 611 (1968); *Freedman v. Maryland,* 380 U.S. 51 (1965).

In *Roaden v. Kentucky, supra,* this Court reasoned that an adult bookstore, as well as the materials contained within, warrant a higher degree of protection than that afforded ordinary contraband. In reversing and remanding the conviction of the defendant for exhibiting obscene material at a commercial theater, the Court stated:

> ". . . [t]he setting of the bookstore or commercial theater, each presumptively protected under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examined what is 'unreasonable' in light of the values of freedom of expression." 93 S. Ct. 2796 at 2801.

This presumption of protected expression requires that the trier of fact must "focus searchingly on the question of obscenity." *Heller v. New York, supra* at 488-489; *Marcus v. Search Warrant,* 367 U.S. 717, 732, 81 S. Ct. 1708 (1961). These protections were created by this Court to guard against encroachments by the state on freedom of expression, thereby "chilling" their exercise.

This Court has long held that state action, constituting a prior restraint upon the press or speech is strongly disfavored and is tolerated only in the most exigent circumstances. *Near v. Minnesota,* 283 U.S. 697 (1931); *New York Time Co. v. United States,* 403 U.S. 713 (1971); *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 99 S. Ct. 2667, 61 L. Ed. 2d 394 (1974). "Any system

of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

The petitioners contend that the Special Grand Jury has not employed the "rigorous procedural safeguards" required to be "sensitive at all times to [the] production of First Amendment rights otherwise involved.'" *Bee See Books, Inc. v. Leary*, 291 F. Supp. 622 (S.D.N.Y. 1968); *Maguin v. Miller*, 433 F. Supp. 223 (1977) and that the Special Grand Jury has "chilled" the exercise of First Amendment rights.

The Special Grand Jury has subpoenaed one copy of all materials held for commercial sale by the petitioners. Even though only a single copy of each publication was subpoenaed, the Special Grand Jury has cast suspicion upon the material, thereby inducing the petitioners to reluctantly refrain from the further distribution of the subpoenaed materials, despite the fact that no determination on the issue of obscenity has been rendered by a neutral and detached magistrate. *Heller v. New York, supra; Miller v. California, supra.*

The subpoenaed materials are therefore still under the presumption of protected expression, as is the setting of the bookstores themselves, and until the material is deemed to be obscene, it is protected under the First Amendment. *See Paris Adult Theater I v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973); *Kois v. Wisconsin*, 408 U.S. 229, 92 S. Ct. 2245, 33 L. Ed. 2d 312 (1972).

The Special Grand Jury is operating as an "ex parte" censor without employing the procedural safeguards necessary to

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9. *Miller v. California*, 413 U.S. 15 (1973).

effectively erode the presumption of protected expression. The petitioners are placed in a posture of uncertainty regarding the legality of the subpoenaed materials and until a determination on the issue of obscenity is made, if ever, the prior restraint and the "chill" on First Amendment rights is continuing as the petitioners are coerced into becoming self-censors and continuation of the grand jury practices will ultimately result in the closing of the petitioners' bookstores, thereby constituting an impermissible prior restraint. *Brockett v. Spokane Arcades, Inc., et al.*, No. 80-1604 (November 9, 1981).

This Court has consistently guarded the guarantees of the First Amendment from encroachment by the state and has mandated rigorous procedural safeguards to insure that this precious right is not "chilled" or restrained. The dissemination of printed materials and other forms of expression is to be considered one of our most zealously protected rights. The Special Grand Jury has effectively circumvented the procedural safeguards mandated by this Court to the detriment of the petitioners, thereby constituting a prior restraint and a "chill" on First Amendment rights.

IV.

The compelled production of presumptively protected materials by the Virginia Special Grand Jury when such production tends to incriminate those compelled to produce violates the Fifth Amendment.

The Fifth Amendment guarantee against compelled self-incrimination has long been held to extend absolute protection to an accused from being coerced by the state to be a witness against himself.

> "The object of the Amendment is to establish, in express language and upon firm basis, the general

> principle of English and American jurisprudence, that no one shall be compelled to give testimony which may expose him to prosecution for crime." *Hale v. Henkel,* 201 U.S. 43 at 48 (1906).

The grand jury is a basic component of the criminal system and does not act as an independent investigatory body but is an arm of the prosecution. *United States v. Cleary,* 265 F. 2d 459, 461; *In re: Grand Jury Proceedings (Schofield),* 486 F. 2d 85 at 90.

The Special Grand Jury was empanelled to investigate possible criminal activity; any criminal activity which it uncovers is subject to possible prosecution. The Fifth Amendment erects a "zone of privacy" through which the government may not intrude and acts to protect the private papers which, if produced, would tend to incriminate the producer. *See Griswald v. Connecticut,* 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); *Couch v. United States,* 409 U.S. 322, 43 S. Ct. 611, 34 L. Ed. 2d 548 (1972); *Bellis v. United States,* 417 U.S. 85, 94 S. Ct. 2179, 40 L. Ed. 2d 678 (1975). The subpoenas issued by the Special Grand Jury were directed to the petitioners as individuals,[10] and not toward a corporate entity.

The requested materials are presumptively protected under the First Amendment[11] and would represent prima facie evidence of obscenity law violations if produced before the Special Grand Jury and a recommendation to the regular grand jury to indict the petitioners is accepted.

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10. Petersburg Transcript, June 22, 1981, p. 12.

11. *Rooden v. Kentucky, supra.*

The alleged violation of the petitioners' Fifth Amendment right against compelled self-incrimination is far from speculative in this case, as the material is permitted to "speak for itself" in an obscenity trial. Under the guidelines established in *Miller v. California, supra,* the state need only introduce the material alleged to be obscene in order to meet its burden at trial.[12] It is the material itself, supplied by those against whom it would be used, which could constitute substantially the entire evidentiary portion of the trial. Even though Va. Code Ann. §19.2-212 mandates that all evidence and transcripts of the Special Grand Jury proceedings be sealed and thereafter divulged only upon order of the court if the Special Grand Jury cites a witness with perjury, the Special Grand Jury's recommendation to the regular grand jury is predicated upon the evidence before it. In such an instance, the very material produced by the petitioners, presumptively protected material under the First Amendment, effectively forms the foundation of the prosecution's case.

The Fifth Amendment and the decisions of this Court do not require that self-incrimination occur prior to the application of the Amendment.

All that is required is that the testimony "tends" to incriminate.

> "The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself, in other words, to give testimony *which may possibly expose him to a criminal charge.*" (Emphasis added.) *Hale v. Henkel, supra* at 49.

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12. Where the material is designed for a bizarre sexual group however, the state may be required to produce expert testimony in the area of prurient appeal. *Paris Adult Theater I v. Stanton,* 413 U.S. 49 at 56 n. 6 (1973); *United States v. Hamling,* 418 U.S. 87, 94 S. Ct. 2887 (1974).

To infer that the violation of the petitioners' Fifth Amendment rights is speculative because the Special Grand Jury cannot itself directly issue a criminal indictment when it is an initial stage of the Virginia criminal procedural process and no indictment has yet been issued, is to construe too narrowly the scope and purpose of the Fifth Amendment protection and this Court should hold that, under the circumstances herein presented, the compelled production of presumptively protected material is violative of the Fifth Amendment guarantee against compelled self- incrimination.

V.

The petitioners' due process rights have been violated by compelling the production of presumptively protected material pursuant to the subpoena power of the Special Grand Jury.

The Special Grand Jury in Virginia has subpoenaed one copy of "each and every book, magazine, pamphlet or other publication which is offered for public sale." This Court has consistantly required additional constitutional procedural requirements be met by the state before the distribution of presumptively protected material can be interrupted by the state. Mr. Justice Brennan, writing for the majority in *Marcus v. Search Warrant*, 367 U.S. 717 (1961), stated:

> "It follows that, under the Fourteenth Amendment, a state is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regarding to the possible consequences for constitutionally protected speech." 367 U.S. at 731.

The seizure principle expressed above is fully applicable to grand jury proceedings as a seizure pursuant to a warrant and the deprivation pursuant to a subpoena both result in the

interference of the First Amendment freedom of expression. To maximize the protection afforded presumptively protected materials, procedures which interfere with distribution must be designed to ensure that non-obscene material is neither seized or its distribution halted prior to a determination that the material is obscene, and therefore outside of the protection of the First Amendment. The seizure process in *Marcus, supra,* was found to be defective because there was no "scrutiny by the judge of any materials considered by the complaint to be obscene." 367 U.S. at 732. The *Marcus* Court, therefore, mandated a "procedure . . . designed to focus searchingly on the question of obscenity" prior to any seizure or interference with presumptively protected material. 367 U.S. at 732. Further, the First Amendment imposes "a higher procedural requirement" to ensure against the curtailment of free expression. *Bantam Books, Inc. v. Sullivan,* 374 U.S. 58, 66, 83 S. Ct. 631, 9 L. Ed. 2d (1968); *Heller v. New York, supra; Roaden v. Kentucky, supra* at 504.

Miller v. California, 413 U.S. 15 (1973) sets out the test which must be applied by the trier of fact in determining the question of obscenity. Prior to such a determination, the material enjoys the protection of the First Amendment and its possession and distribution cannot be interfered with.

The procedural mandates in *Miller, Heller* and *Roaden,* have been consistantly upheld by this Court. *See Hamling v. United States, supra; Jenkins v. Georgia,* 418 U.S. 153 (1974); *Mishkin v. New York,* 383 U.S. 502 (1966). These mandated procedures require that a neutral or detached magistrate focus searchingly on the question of obscenity before even a single copy of a book or magazine can be retained by the state and its subsequent distribution halted.

The procedural device of a subpoena is being utilized here by the state as a de facto censoring mechanism without clearing

the "higher hurdle of reasonableness" required by this Court prior to state interference with the distribution of presumptively protected material. To permit the State of Virginia to effectively censor material protected by the First Amendment in this manner is to ignore the constitutional history created specifically to ensure the freedom of expression guaranteed under the First Amendment and procedural guarantees under the Fourteenth Amendment.

CONCLUSION

For the reasons herein stated, the petitioners respectfully request that this Honorable Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit to determine the substantial constitutional issues created as a result of the decision. It is respectfully suggested that the decision of the court below is in conflict with the constitutional guarantees of the United States Constitution.

Respectfully submitted,

BURTON W. SANDLER
Attorney for Petitioners